

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

OAH No. L 2006070192

RISA B.,

Claimant,

vs.

TRI-COUNTIES REGIONAL CENTER,

Service Agency.

DECISION

The hearing in the above-captioned matter was held on August 22, 2006, at Simi Valley, California. Joseph D. Montoya, Administrative Law Judge, Office of Administrative Hearings, presided. Tri-Counties Regional Center, the Service Agency, appeared through Jackson Wheeler, a manager at the Service Agency. Claimant appeared through her mother, Shara B., and her father, Gerald B.¹

Evidence was received, the matter argued, and the case submitted for decision on the hearing date. The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders, as follows:

ISSUE PRESENTED

Should the Service Agency be required to pay for a personal trainer to work with Claimant, an adult consumer, at a local gym, so that she can work out five days per week? In this case Claimant asserts that due to her physical disabilities and limitations, she often falls down, and that an exercise program would strengthen her, minimizing the chance that she would fall, and minimizing injury when she does fall. The Service Agency asserts that there is no showing that her balance will improve from an exercise program, and that in any event, the requested service is outside the scope of the Lanterman Act.

¹ Initials are used for the Claimant's surname, in the interests of privacy.

FACTUAL FINDINGS

1. Claimant Risa B. is a 28-year old woman, born July 18, 1978, and a consumer of services provided by the Tri-Counties Regional Center (Tri-Counties or the Service Agency). Those services are provided under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.² Claimant is eligible for services based on the fact that she suffers from Cerebral Palsy and Mild Mental Retardation. There is no dispute that she is eligible for services in the general sense, rather, the dispute in this proceeding pertains to a particular kind of service and whether it should be provided to Claimant.

2. On or about July 3, 2006, Claimant's mother, who is her conservator, filed a request for hearing. The stated reason for the request was the refusal of the Service Agency to fund a structured exercise program. The document stated the desired resolution of the matter as funding for a personal trainer at 24 Hour Fitness, to work five times per week, one hour at a time, with Claimant. (Exhibit 1.)³ This hearing ensued. There is no dispute that jurisdiction was established to proceed with this hearing.

3. Claimant currently lives at home with her parents, in Ventura County. She requires round-the-clock supervision and support due to her disabling conditions. For example, as of July 2003, it was recorded that she needed assistance in the home with showering, brushing her teeth, and shampooing her hair. (Ex. 2, p. 8.) As of April 2006, she was "learning to be familiar with basic safety and emergency procedures." (Ex. 6, p.1.) In July 2006, the Service Agency agreed to fund 288 hours of respite care per month because Claimant had lost her integrated work position and was unable to participate in other day program activities. (Ex. 7, p. 1.)

4. For several years Claimant had been able to work in an office through a work training program. Claimant would perform basic office functions, such as filing. She had an aide to assist her, and in recent years a key part of that aide's function was to prevent or at least minimize injury to Claimant because Claimant would occasionally fall down. That Claimant lost her integrated work position—her job—is a function of the fact that she was falling more than ever before, which posed safety issues at the job site.

5. Claimant introduced a chart generated by her parents, which shows how often she has fallen down in recent years. The chart, Exhibit A, was based on reports that have been made by Claimant's caregivers. The chart shows both year-to-year totals, and monthly totals. Overall, it shows an increase in the number of times that Claimant has fallen down since 1997. For example, in 1997 Claimant fell down once, and in 1998 not at all. Two falls were reported in 1999, and six in 2000 and 2001. However, in 2004, she fell 18 times, and she fell 27 times in 2005. In the first eight months of 2006, she has fallen 11 times.

² All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

³ The Service Agency's exhibits were numbered, and Claimant's were identified alphabetically.

6. Claimant's mother pointed to a correlation in the rise in the incidents of Claimant falling down, and the fact that she is not involved in regular, structured, exercise, and has not been for several years. When Claimant was receiving special education services from her school district, those services included adaptive physical education. That structured exercise program ended when the special education services ended, approximately six years ago, and in the last three years there has been an increase in incidents. The Claimant's perceived decline in strength coupled with problems with weight gain, have been perceived by her family as making Claimant more susceptible to falling down.

7. In February 2006 Claimant was examined by her orthopedist, Saul M. Bernstein, M.D., who wrote a report regarding the exam. (See Ex. 8.) Dr. Bernstein has treated claimant for approximately 20 years (see Ex. B, p.1). In the February 2006 report Dr. Bernstein noted that Claimant was in good condition from an overall point of view. He opined that she should not be placed in a wheelchair or walker, and that she should receive as much assistance as possible. He also recommended that she "continue with an exercise program. She might do well on a light weightlifting program and use machines such as a treadmill where she can hold on the sides. Using a bicycle, etc. is also of benefit." (Ex. 8, p. 2.)

8. (A) In May 2006, Claimant was examined by a physical therapist, Derrick T. Issa, M.P.T., D.P.T. Claimant's mother had asked for an exam so as to evaluate Claimant's "balance, lower extremity strength, and gait." (Ex. 10, p. 1.) During the examination, Claimant's mother reported that incidents of falls decreased when Claimant was involved in a regular exercise program, and that at the time of the exam, Claimant was working and had an aide to help with ambulating stairs and to provide verbal cues when Claimant was ambulating over curbs or around other obstacles. Mrs. B. also told the physical therapist that her daughter exercised "regularly" on a treadmill at 2.7 m.p.h for 30 minutes. (Id.)

(B) Mr. Isa reported that Claimant could ambulate independently on level surfaces, and recommended stand-by assistance for lateral gait. For backward gait, minimal assistance was recommended, along with verbal cueing. She was described as independent in opening or pulling doors. She had fair to good strength in her lower extremities, for her quadriceps, hip flexors, and hamstrings. (Ex. 10, p. 1.)

(C) Mr. Isa had reviewed Dr. Bernstein's February 2006 report, as well as the report of Dr. Nopar from May of 2006 (see Finding 10, below) and concluded she could work safely on her job. He recommended that she "continue on a supervised gym exercise program to build her lower extremity strength and endurance." (Ex. 10, p. 2.)

9. In a report dated July 20, 2006, Dr. Bernstein again provided support to the Claimant's position that she should engage in a structured exercise program, several days per week. In that report, Dr. Bernstein stated that he did not believe that a traditional physical therapy program would be appropriate for Claimant, and that regular exercise would

provide a number of benefits, including improved control over her own body, improved overall body tone, strength in her extremities, and improved spatial awareness and balance. (Ex. C.)

10. On May 18, 2006, Dr. Robert E. Nopar, M.D. observed Claimant in a public setting, the bus drop-off in Thousand Oaks, California. Dr. Nopar is on the Tri-Counties staff, and has considerable experience working with the developmentally disabled. Claimant was on her way to her former place of employment at that time. Dr. Nopar was able to see her alight from a bus, which he observed her to do without difficulty. (Ex. 9, p. 1.) He had an in-depth discussion with Claimant's mother, who reported that Claimant had lost 20 pounds, and that she had been engaged in a fitness and muscle strength program which Mrs. B. believed to have been of significant benefit. Dr. Nopar opined that Claimant could safely continue to work without undue risk if her one-to-one aide remained present to cue her and to otherwise assist her. (*Id.*, p. 2.)

11. Dr. Nopar and Claimant's mother met about one month after his initial observation, on June 20, 2006. The purpose of the meeting was to discuss the Claimant's request that a dietician and personal trainer be provided. (See Ex. 11.) Mrs. B. explained her belief that a formal diet plan was necessary to help her daughter continue on her positive trend of weight loss, and to maintain that lower weight. She also explained her belief that a guided exercise program would increase Claimant's fitness level and would improve her balance and make her less prone to fall. (*Id.*)

12. (A) Dr. Nopar described his meeting in an ID Note—a note to the Claimant's file. In that note he also recorded his opinion regarding the efficacy of the service request. Essentially, he agreed with the proposed goals, but was of the opinion that the services were not the type of service that the regional center was obligated to provide. Further, he opined that while Claimant might become more physically fit, her balance would not necessarily improve. (Ex. 11.)

(B) Dr. Nopar testified in this proceeding. He agrees that Claimant could benefit from regular exercise, and he stated that increased strength and fitness would improve her balance, to a degree; if she were stronger her stability would increase to some extent. However, he is of the opinion, based on years of working with people who suffer from Cerebral Palsy, that Claimant's balance problems are in part a function of her core brain damage, and that increased muscle strength will not alleviate the issue. Dr. Nopar attested that if increased strength is the main goal, a physical therapy program is not the answer, as physical therapy programs concentrate on range of motion, muscle tone, and other goals.

13. Between approximately February and early August, 2006, Claimant was exercising with a personal trainer at a 24 Hour Fitness center in Ventura County. The program was individually designed for her, with one-to-one supervision by Tanya M. Hirzel, a certified personal trainer who apparently follows the precepts of the National Academy of Sports Medicine. Ms. Hirzel, in a letter generated in early August 2006, reported progress on Claimant's part, and she recommended that Claimant continue with training three to five

days per week, at least one hour per session, with a qualified trainer. Mrs. Hirzel is of the opinion that simply sending a companion with Claimant is not sufficient to provide the proper exercise program. (Ex. E.)

14. Claimant wrote a short letter in support of her request Mrs. B. testified that a five-times per week program would cost approximately \$1,000 per month, or approximately \$50.00 per hour. All parties agree that neither Ms. Hirzel nor the 24 Hour Fitness center where she works are vendors of Tri-Counties, or any other regional center.

15. A Service Agency manager attested that the organization has concluded that physical fitness is a goal that any person, developmentally disabled or not, should pursue, and that such is plainly beneficial to anyone. However, Tri-Counties pointed out that the average person bears the cost of such programs themselves, and that in any event most persons are able to utilize a workout center's equipment alone once they have received a short orientation on how to use the equipment. The Service Agency had offered to provide a one-to-one assistant for Claimant, and part of that aide's work could be to accompany Claimant to the gym, and to assist her with the equipment. At some point the Service Agency had indicated to Claimant's mother that if exercise was needed, and a physical therapy prescription obtained, then the Service Agency could provide some or all of such services if no generic source could be found. The fact that Claimant and her family receive IHSS (In Home Supportive Services) monies for support was raised by the Service Agency as a source of funding for the program, but there was no evidence that such funds could legally be used for such services. Finally, it was asserted that the fitness center is a generic resource that the Service Agency could not supplant.

16. As acknowledged by the Service Agency's staff physician, Dr. Bernstein enjoys an excellent reputation as an orthopedic specialist. However, Dr. Nopar is also quite experienced, and weight should be given to his opinions as well. All the witnesses were credible in their demeanor when they testified.

17. The Claimant enjoys attending the gym, as there is music, other people, and she is very fond of her trainer. (See Ex. F.) In contrast, she exhibited an extreme dislike of physical therapy when she has attended it in the past.

18. Based on the entire record, and particularly the Findings above and the cited evidence, it has been established that Claimant can not safely access an exercise program without at least some assistance from a qualified trainer, but it has not been established that the level of input and guidance from a trainer must rise to the level of five hours per week, nor has it been established that such would be cost-effective. While it has not been established that a structured exercise program will definitely lead to a reduction in falls, regular structured exercise will be beneficial to Claimant in any event.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to Code section 4710 et seq., based on Factual Findings 1 and 2.

2. Services are to be provided in conformity with the IPP, per section 4646, subdivision (d). Consumer choice is to play a part in the construction of the IPP. (See §§ 4512, subd. (b); 4646, subd. (a).) Where the parties can not agree on the terms and conditions of the IPP, a Fair Hearing decision may, in essence, establish such terms. (See § 4710.5, subd. (a).)

3. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each client's particular needs must be met. (*See, e.g.*, §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), 4648, subd. (a)(1) & (a)(2).) Otherwise, no IPP would have to be undertaken. A priority is assigned to maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).)

4. Section 4512, subdivision (b), of the Lanterman Act states in part:

‘Services and supports for person with developmental disabilities’ means specialized service and supports or special adaptations of generic services and support directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or re-habilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. . . . The determination of which services and supports are necessary shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of . . . the consumer’s family, and shall include consideration of . . . the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, . . . physical, occupational, and speech therapy, . . . habilitation, . . . recreation, . . . camping, . . . respite, . . . social skills training’

5. Services provided must be cost effective (section 4512, subd. (b)), and the Lanterman Act requires the regional centers to control costs so far as possible, and to otherwise conserve resources that must be shared by many consumers. (*See, e.g.*, §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) To be sure, the obligations to other consumers are not controlling in the decision-making process, but a fair reading of the Lanterman Act leads to the conclusion that a regional center is not required to meet a disabled person's every possible need or desire, in part because it is obligated to meet the needs of many children and families.

6. Section 4648, subdivision (a)(3), provides that a regional center may purchase services pursuant to vendorization or contract. Subdivision (a)(3)(A) provides that vendorization or contracting is the process of identifying, selecting, or utilizing vendors or contractors, based on qualifications and other factors. The Department of Developmental Services has enacted regulations governing the establishment of persons or firms as vendors. (See California Code of Regulations (CCR), title 17, §54300, et. seq.)⁴ Other regulations control the purchase of services by contract. (*See, e.g.*, CCR § 50607.) All of these provisions plainly exist to not only control costs, but to assure the quality of services.

7. A supervised exercise program, of the type requested by the Claimant, is the type of service that a regional center may provide under the Lanterman Act. This Conclusion is based on Section 4512, subdivision (b), *supra* and Factual Findings 1, 3 through 9, 12(A) and 12(B)17, and 18. Where the statutorily-authorized services include, but are not limited to camping, habilitation, and recreation, there is no doubt that the provision of a trainer to assist an adult consumer to access an exercise program in a the community is an authorized service.

8. The requested service is not, as asserted at the hearing, a generic service. “Generic service” is the term used by regional centers to refer to services that are normally provided or funded by a source other than a regional center. While this may include sources such as health insurance plans, it also refers to publicly-funded sources, such as Medi-Care or the school system, and the regional centers are not to supplant such funding in the latter cases. (See §4648, subd. (a)(8).) A local private gym can not be found to be a generic resource. Further, given this consumer’s status as an adult, it can not be found that her parents, who already provide her with support, are responsible for providing her with an exercise program.

9. A structured and supervised exercise program of the type requested by Claimant would meet the Claimant’s needs for physical fitness and strength, and would be appropriate under the Lanterman Act. This Conclusion is based on Legal Conclusions 2 through 5, and 7, and Factual Findings 1, 3 through 9, 12(A) through 14, 17, and 18. It is noteworthy that Dr. Nopar, Dr. Bernstein, and the physical therapist, Mr. Issa, all hold the opinion that a structured exercise program would be beneficial to the Claimant, and that a traditional physical therapy program would not be appropriate. Further, continued access to a gym in the community would increase her participation in the community. While the proposed goal of diminishing Claimant’s recent tendency to fall down by increasing her strength is a proper goal within the meaning of the Lanterman Act, and is appropriate to meet the needs of this consumer, the more limited goals of increasing her fitness, managing her weight, and maintaining her presence in a mainstream source of community life also constitutes a proper goal within the meaning of the Lanterman Act and are appropriate for this consumer.

10. (A) It has not been established that the program as requested by Claimant would be cost effective, but a more modest program may be demonstrated to be cost-effective. In this regard it must be noted that even during the six months that Claimant was

⁴ All further citations to the California Code of Regulations shall be to title 17.

working with a trainer, and losing weight, she still fell nine times, which was more than any year but 2004 and 2005. (See Ex. A.) Given that the record established that a five-day program would cost approximately \$1,000 per month, it is not clear that continuing such intense levels will yield an improvement in the rate at which Claimant falls down. However, fitness alone is a proper goal of the IPP.

(B) Ms. Hirzel opined that three to five times per week was appropriate. (Ex. E., p. 2.) Thus, some amount less than five times per week may meet the Claimant's needs. Furthermore, Mrs. B. attested that she sometimes takes her daughter to the gym, and works with her, but does not have the time to do so during the week. This indicates that supervision by a trainer on an every day basis may not be necessary, and that some other person could assist the Claimant at least some of the time.

11. The Service Agency shall take steps to meet the Claimant's needs for a structured and supervised exercise plan, if a trainer can become vendored to assist Claimant. If that preliminary and necessary condition is satisfied, the Service Agency shall fund two hours per week for a trainer, at the rate of \$50.00 per hour, for a period of six months, with the results of that program to be analyzed at the end of that period. The trainer should be utilized to train Claimant directly, and to consult with those aides or other persons who might accompany Claimant to the gym on days that the trainer is not funded or otherwise available.

ORDER

The Claimant's appeal is sustained, in part.

The Service Agency shall take steps, within the confines of applicable regulations, to vendor a personal trainer for Claimant.

Upon a personal trainer obtaining vendor status, the Service Agency shall fund that person or firm to provide personal training services to Claimant for up to two hours per week, at the maximum rate of \$50.00 per hour. Such funding is to be utilized to have the trainer work directly with Claimant, to design a work-out program for her, and to provide consultation to Claimant's family or any other adult who might be tasked with assisting Claimant at the gym, or in exercise at home.

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Six months after any such funding commences, the IPP team shall meet to determine whether to continue or modify such a program.

September 5, 2006

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.